

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN RAFAEL CITY SCHOOLS.

OAH Case No. 2014080942

ORDER FOLLOWING PREHEARING
CONFERENCE

On December 8, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Amanda Metcalf, Attorney at Law, appeared on behalf of Student. Alejandra Leon, Attorney at Law, appeared on behalf of San Rafael City Schools. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place at **310 Nova Albion Way, San Rafael, CA 94903**. It is scheduled for December 16, 17 and 18, 2014, and to continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On December 16, 2014, the hearing shall begin at 9:30 AM and end at 5:00 PM. On each subsequent day, the hearing shall begin at 9:00 AM and end at 5:00 PM, unless otherwise ordered.

San Rafael shall ensure that the facility for the hearing fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing “good cause” to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

ISSUE 1: Beginning January 1, 2014, did San Rafael fail to timely locate, identify, and assess Student pursuant to its affirmative child find obligations?¹

ISSUE 2: Did San Rafael fail to conduct a timely and appropriate assessment of Student?

Proposed Resolutions²

a. San Rafael shall pay the costs of compensatory education to compensate Student for lack of education progress commensurate with his abilities;

b. San Rafael shall find Student eligible for special education services and find that Student requires residential placement suitable to his unique needs;

c. Student shall be allowed to remain at his current residential placement at San Rafael's expense;

d. San Rafael shall reimburse Student's parents for the cost and related expenses for Student's past, current, and future residential placements; and

e. San Rafael shall reimburse Student's parents for the reasonable past, current, and future costs and expenses related to securing a FAPE for Student, including but not limited to, fees paid and for assessments, travel, accommodations, and legal services.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses.

¹ At the PHC, Student's attorney objected to the ALJ's proposed clarification of the case's issues. Student's attorney argued that she had pled issues other than those which the ALJ identified at the PHC. Specifically, Student's attorney asserted that she had sufficiently identified issues regarding Student's eligibility for special education and San Rafael's failure to offer Student a free appropriate public education. San Rafael contended that the complaint did not put them on notice as to these issues. Student's attorney's argument was found unpersuasive and her objection was overruled.

² Student's complaint contained a demand for Student's parents to be financially reimbursed for expenses which they incurred as a result of Student's educational placement and services. This demand was identified as an "issue" in Student's complaint. As ruled at the PHC, this demand was not an issue, but instead a proposed remedy. As such, it has been rephrased and included as part of the Proposed Resolutions.

The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses.

a. Each party is responsible for procuring their own witnesses; however, the parties shall make witnesses under its control reasonably available to the other party. San Rafael previously agreed to make available its staff members, whose names are listed as witnesses in Student's Prehearing Conference statement. As such, in advance of the hearing, Student shall provide San Rafael with a witness schedule which identifies the dates and times that San Rafael's staff members will be needed for testimony.

Both parties shall schedule witnesses in a way that avoids delays and minimizes or eliminates having to call a witness twice or out of order. Prior to commencing the hearing, the ALJ and the parties will discuss the proposed witness schedule and address scheduling issues for individual witnesses, before the schedule is finalized. Only witnesses disclosed in a party's prehearing conference statement may testify, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b. At the beginning of the hearing, each party shall serve on the other party and on OAH a tentative witness list containing the estimated length of the witness' testimony and, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. The ALJ has discretion to limit the number of witnesses and the length of their testimony.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. As to those witnesses who are common to both parties, the parties shall conduct both their direct and cross examinations of the witness, such that the witness does not need to be recalled.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

On November 4, 2014, Student's Motion to Examine Witnesses at Hearing by Telephone was granted in part and denied in part. Specifically, the ALJ's order found that [Redacted] were permitted to testify telephonically, in the event that the witnesses were permitted to testify. At the PHC, neither party requested that any other witness be permitted to testify telephonically for the hearing.

7. Electronic Recording of Hearing.

a. Audio Recording. Both parties intend to make an audio recording of the hearing. The following conditions apply to any recording: 1) that OAH's recording is the only official recording; 2) that the recorder will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; and 3) the operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Motions. At this time, no prehearing motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during this prehearing conference.

9. Compensatory Education and Reimbursement. Any party seeking expense reimbursements shall present admissible evidence of the expense, or a stipulation to the amount, as part of its case in chief. Any party seeking compensatory education shall provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

10. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

11. Conduct and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

12. Special Needs and Accommodations. At present neither party anticipates the need for any special accommodation for any witness or party. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>

13. Hearing Open to the Public. At Student's request, the hearing will be open to the public. Student is uncertain of the number of observers who anticipate attending the hearing.

14. Settlement. The parties are encouraged to continue their attempts to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. THE BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

15. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: December 10, 2014

/s/

B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings